10 Eight

In Service for Arkansas Law Enforcement

Arkansas Attorney General Mike Beebe

Volume 11, Number 3 December 2003

Dear Ten-Eight Reader:

Arkansas Sheriffs' Youth Ranches are near and dear to my heart. They provide a safe, healthy, and permanent home for children who have been abused, neglected, or abandoned, or who may need a more structured environment to help them fully reach their potential. The Ranches give children a sense of belonging and let them know that they are valued. On October 23, the eighth-annual Children's Award Dinner to benefit the Ranches was held to honor Senator Blanche Lincoln, and I was privileged to be Master of Ceremonies.

Founded in 1976, the Arkansas Sheriffs' Youth Ranches are licensed child-care facilities for at-risk youth and have served as home to more than 400 children. They receive the support of the Arkansas Sheriffs' Association, offer a residential child-care program, an outreach counseling program, a court-appointed special-advocate program for neglected children, and the S.T.A.R. (Sheriffs' Ranches' Therapeutic Activities and Recreation) program, as well as community education and training.

The Ranches currently operate on several campuses, a 528-acre site on the White River near Batesville, an 87-acre site on the Spring River near Hardy, and there's a new campus near Lake DeGray. Two additional campuses are currently under construction, one near Alma and one near Harrison. Thanks to all those who support the efforts of the Sheriffs' Youth Ranches.

Sincerely,

Mike Beebe

HELPER'S HIGHLIGHT

"You have not lived a perfect day, even though you have earned your money, unless you have done something for someone who will never be able to repay you."

-- Ruth Smeltzer

In this issue, we recognize Deputy Marsha Haley, who joined the Pulaski County Sheriff's Office in January, 1999. In addition to her regular duties as a Patrol Deputy, Haley is an instructor and evaluator in the deputy field-training program. She is described as one who consistently "goes above-and-beyond" in the training she gives to recruits, being extremely proactive and creating "hands-on" scenarios instead of waiting for incidents to happen.

Sheriff Randy Johnson states that, "with regard to her duties as an instructor, her professional interaction with the new deputies not only has an immediate positive effect on them as trainees, but it

(continued on page 4)

What's Inside:

Development in Sex-Offender Assessment & Registration.....page 2

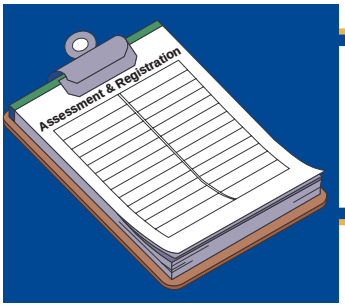
Loitering: A Poor Basis for a Stop .....page 3

Recent Notable Arkansas Criminal Appellate Decisions .....page 3

Guidelines for Consensual Searches .....page 4

Stick to the Facts and Say It Simple.....page 5

Arkansas Missing Children Services Program .....page 6



Development in Sex-Offender Assessment & Registration

Nicana C. Sherman
Law Librarian/Assistant Attorney General

Arkansas has specific laws and regulations concerning the risk assessment of persons convicted or adjudicated for certain sexual offenses. The Sex Offender Assessment Committee is responsible for assisting the Department of Correction ("DOC") in developing the regulations and guidelines necessary to accomplish this. The Committee is separate from, although it was created at the same time as, the Sex Offender Screening and Risk Assessment Committee, which is the unit within DOC responsible for adult assessments. Juvenile assessments are conducted by the Family Treatment Program at Arkansas Children's Hospital.

The statutes governing sex-offender assessment were amended by Acts 1390 and 1265 in the 2003 Arkansas General Assembly. Many changes were only technical, bringing the language and arrangement of certain sex offenses into conformity with legislation enacted in 2001. Under Act 1390, the sections concerning enhanced penalties for certain violent felonies and selected definitions and sexual offenses were renumbered and moved. Also amended were sections concerning testing of certain sex offenders for the human immunodeficiency virus (HIV), criminal records, definitions relating to the rights of crime victims, and transfer eligibility of prisoners by the Post Prison Transfer Board.

Act 1265 added a new section, Ark. Code Ann. § 9-27-356, concerning juvenile sex-offender assessment and registration, making risk assessment mandatory for juveniles adjudicated delinquent for specified offenses, including rape, sexual assault in the first-or-second degree, incest, and engaging children for use in child pornography.

Additionally, that Act provides flexibility for the court to order risk assessment for juveniles adjudicated for any offense with an underlying sexually motivated component, but not included in the mandatory offenses. Further, a court may order that adjudicated juveniles register as sex offenders, after a hearing, and may also order reassessments. If the court does not order registration, a prosecutor may file a motion requesting such an order, based on risk-assessment results, if the adjudication was for offenses requiring assessment.

The hearing procedures necessary for ordering registration of the juvenile require that the juvenile be represented by counsel and that the court consider various factors, including the level of planning and seriousness of the offense, the protection of society, previous history, rehabilitation programs available, and relevant written reports or materials. The court is required to issue written findings. The Act lists the steps necessary to complete the registration.

The Act also added another section, requiring that certain persons have DNA samples drawn in accordance with regulations promulgated by the State Crime Laboratory. This is mandated for those adjudicated for the offenses of rape, sexual assault in the first-or-second degree, incest, capital murder, murder in the first-or-second degree, kidnapping, aggravated robbery, and terrorist acts.

The current Guidelines are available at the Secretary of State's Web site. http://www.sosweb.state.ar.us/elections/elections_pdfs/register/Nov_02_Reg/004.00.02-003.pdf

Loitering: A Poor Basis for a Stop

***Lauren Heil**, Assistant Attorney General*

In Brazwell v. State, the Arkansas Supreme Court held that a Little Rock police officer did not reasonably detain a man to investigate whether he was loitering outside a liquor store. Brazwell is significant because it holds that suspicion of loitering does not provide justification to detain a suspect under Arkansas Rule of Criminal Procedure 3.1.

Shortly before 10:00 p.m. on January 15, 2002, Officer Christian Sterka was patrolling near a small strip mall containing a convenience store and a liquor store. The owners of those stores had complained to police about loitering-and-narcotics activity, and both posted large "No Loitering" signs. Officer Sterka saw Brazwell, who appeared to be under 21, sitting on the window ledge of the liquor store – directly beneath a "No Loitering" sign. Officer Sterka approached to ask for his identification and issue a loitering citation. Brazwell began to rub a large bulge on his right thigh.

Concerned for his safety, Sterka asked Brazwell to put his hands on the patrol car, whereupon Brazwell said that he had a gun in his left pants' pocket. In a search incident to arrest, Sterka also discovered packages of cocaine in Brazwell's pants.

Relying on Rule 3.1, the Supreme Court concluded that the gun and the drugs should have been suppressed. The Rule only allows an officer to stop and detain a person the officer reasonably suspects "is committing, has committed, or is about to commit (1) a felony, or (2) a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property, if such action is reasonably necessary either to obtain or verify the identification of the person or to determine the lawfulness of his conduct." Because loitering is neither, the Court concluded that Officer Sterka did not have reasonable suspicion to detain Brazwell and investigate that offense.

Rejecting the State's alternative argument, the Court concluded that Officer Sterka did not have probable cause to arrest Brazwell for loitering. It said that he had not observed Brazwell for a sufficient length of time before detaining him to determine whether he was "lingering" or "remaining" outside the liquor store.

The Court did not explain, however, how long an officer must observe someone before arresting him for loitering. This case and an earlier one from the Arkansas Court of Appeals, Anderson v. State, demonstrate that loitering is a difficult crime upon which to find either reasonable suspicion or probable cause of criminal activity.

Recent Notable Arkansas Criminal Appellate Decisions

***Clay Hodges**, Assistant Attorney General*

Lawrence v. State, 81 Ark. App. 390, 104 S.W.3d 393 (2003)
HELD: When a witness claims lack of memory of giving a statement to police, the statement may nonetheless be admitted as substantive evidence if, at the time the statement was given, the witness acknowledges the veracity of the statement and the officer who took the statement testifies that the statement is accurate.

Colburn v. State, 352 Ark. 127, 98 S.W.3d 808 (2003)
HELD: For purposes of the enhancement portions of the domestic-violence statutes, a prior offense means an offense committed before the one that is the subject of the trial. Thus, a defendant who pleaded guilty to domestic violence for an act that occurred on August 15, could not have that plea used to enhance his sentence at a trial for an act that occurred on August 14.

Lancaster v. State, 81 Ark. App. 417, 105 S.W.3d 365 (2003)
HELD: A person has no reasonable expectation of privacy in one's driveway, absent the erection of a gate or other barrier, even when "No Trespassing" signs are posted. The driveway itself extends an invitation to the public to approach the house for personal or business purposes, including police business.

Heikkila v. State, 352 Ark. 87, 98 S.W.3d 805 (2003)
HELD: In a case requiring interpretation of the incest statute, the Arkansas Supreme Court holds that "niece" means either the daughter of one's brother or sister or the daughter of one's spouse's brother or sister, rejecting the defendant's claim that, because he had sexual intercourse with his wife's sister's daughter, the statute did not apply to him.

Smith v. State, 352 Ark. 92, 98 S.W.3d 433 (2003)
HELD: The defendant's conviction for, among other things, first-degree battery committed by causing physical injury by means of a firearm, was modified to second-degree battery when it was determined that the injury occurred from the defendant's beating of the victim with the butt of a gun, resulting in physical injury. The Court construed that portion of the first-degree-battery statute to require injury caused by shooting, not by the use of a firearm as a club.

Kirwan v. State, 351 Ark. 603, 96 S.W.3d 724 (2003)
HELD: A conviction for attempted rape can lie when the victim is fictional. The hallmark of the crime of "attempt" is to engage in conduct constituting a substantial step in a course of conduct intended to culminate in the commission of an offense. When the defendant engaged in online chats with an undercover officer, who posed as an underage girl, solicited sex, and went to a prearranged location to meet her, the fact that the child was fictional did not negate his guilt.

Guidelines for Consensual Searches

***Brent Gasper**, Assistant Attorney General*

Asking for consent to search an automobile can be a very valuable tool for law enforcement in instances in which an officer suspects that the driver or occupants of an automobile might be engaged in criminal conduct, but it is a tool to be used cautiously within very strict legal confines, or else the officer risks having the fruits of the search suppressed.

Arkansas Rule of Criminal Procedure 11 addresses consent searches and seizures, and provides guidelines to be followed. For instance, in cases involving the search of an automobile, consent can only be given by the person registered as its owner or in apparent control of its operation or its contents at the time consent is given. Identifying the proper person to gain consent from is very important, as in the case of State v. Pruitt, a 2002 Arkansas Supreme Court decision which concerned whether consent to search was valid although it was not obtained from the owner of the car, even though she was sitting inside the car when the officer arrived.

Another important aspect of a consent search of a vehicle (or other thing or place) is that it can be limited in time and scope, and can be withdrawn by the person giving consent. Simply put, if the person giving consent to search a vehicle says, "You can search the interior of the car, but not the trunk," then the officer cannot search the trunk during this consensual search.

Additionally, the person giving consent also can say, "You can search the car for five minutes, but no longer." In that case, the officer has to honor that time limitation. If, during the consensual search, the limitations of that search are exceeded, the officer risks having any evidence or contraband found outside the scope of that consent suppressed. However, the law currently does not require that an officer actually advise a person giving consent that he or she has the right to limit or withdraw his or her consent.

Always be aware that a consensual search can turn into a probable-cause search if evidence or contraband is discovered and subject to seizure prior to a withdrawal or limitation of consent. Essentially, if an officer were given consent to search the trunk of a vehicle and contraband were located, that contraband would still be subject to seizure, and probable cause could have developed, despite the driver's subsequent withdrawal of consent to search the trunk. At this point, an officer can proceed to search under probable cause, rather than consent, being mindful that the discovery of contraband may support probable cause to search other areas of the car, as well as an arrest of the driver and/or occupants, which, in turn, might support a search incident to that arrest.

An officer who wants to search an automobile would be best served by first evaluating whether he or she has probable cause to search before merely asking for consent.

However, if probable cause is not present, asking for consent certainly is an option, as long as that officer proceeds within the confines of the law. This means honoring any and all limitations as to time or scope, mandated by the person giving consent, as well as honoring that same person's withdrawal of the consent. If these limitations are honored and the officer proceeds appropriately, consensual vehicle searches can be very useful for patrol officers across the state.

HELPER'S HIGHLIGHT

(continued from page 1)

continues to be reflected in their work after completion of the program."

"Deputy Haley is always the first to volunteer for any assignment that comes up and always gives 110 percent to her work," said Sergeant Patrick Mulligan.

Deeply involved with Special Olympics, on her own time Haley recruits other deputies and area businessmen and women to become involved in such events as Special Olympics, American Heart Walk, and the Torch Run. She organizes the National Night Out events in the Landmark and Sandstone areas each year and is involved in various other community projects.

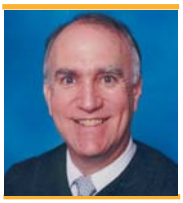
Sheriff Johnson describes Deputy Marsha Haley as "a perfect example of an officer who is committed to enforcement of the law as well as to making her community a safer and better place to live."

The "Helper's High" is a phrase coined by the executive director of Big Brothers/Big Sisters of America to refer to feelings of euphoria generally experienced by volunteers.

If you know an officer who volunteers time to improve the lives of Arkansans, please contact Alicia Banks in the Community Relations Division of Attorney General Mike Beebe's Office at 1-800-448-3014 or 501-682-3646.

Stick to the Facts and Say It Simple

Guest Columnist



Judge Vic Fleming
Little Rock
District Court

Prosecutor
What led you to believe that the subject was intoxicated?

Witness
At nineteen-hundred hours on twenty-seven August, I had occasion to respond to a possible signal nine in the vicinity of mile marker one-seven-zero on Route Twelve. Subsequent to receiving this call, I was dispatched to the scene and arrived at nine-hundred-and-four hours. I discovered the defendant's vehicle off the side of road, straddling a large log. All four tires were off the ground, with the rear two tires spinning. I climbed up on the log and observed the defendant behind the wheel. I knocked on the driver's side window. She gave the strangest look, rolled down the window, and said, "How can you be keeping up with me? I'm doing forty miles an hour."

Teaching a course recently at the National Judicial College, I told that story to judges from twelve states. After a hearty laugh, a couple of them were talking about how law-enforcement officers testify. There was a strong consensus that the most effective officer testimony addresses just the facts, in plain language.

A judge from another state (can't say which one) complained that officers in his court were trained by lawyers who did not try cases. Thus, somehow, they were trained to deal with subjects, rather than people; to do things subsequent to, rather than after, other things; to advise, rather than tell; to have occasions to do things, rather than just do them; and on and on.

When I told my fellow judges how Little Rock police officers testify, they were envious. With few exceptions, LRPD personnel stick to the facts and "say it simple." I don't know who trains them how to testify, but they do a great job.

I advocate simplicity of language in everything. In my first year of law school, I wrote an article, "Libeling the Language," for the ABA's *Student Lawyer*. In it, I poked fun at judges for their use of high-falutin' language in judicial opinions. Just say it (or write it) so most folks can understand it. That was my theme then, and I've stuck to it.

To be more direct and effective, the officer in the anecdote might have said:
On August the twenty-seventh, around seven, I was called to an accident on Route Twelve. There I found the defendant behind the wheel of a car that was straddling a log. The motor was running and tires turning, so I climbed up and knocked on the window. . . .

You get the point. Be brief. Be simple. Be direct. And while you're doing that, tell facts, not conclusions. A judge appreciates,

I saw the car when it was fifty feet before the stop sign. It rolled through the intersection, never slowing to less than five miles-per-hour as it went through the intersection,

more than

I had a good view of the intersection and the defendant clearly ran the stop sign.

The first gives facts. The second leaps to a conclusion and, in doing so, may not give enough information to convict.

Remember that not only is brevity "the soul of wit," it also projects intelligence and confidence. Witnesses who make their words cover more ground than they occupy fare well, on both direct-and-cross examination. And the judges before whom they testify appreciate their efforts.

Bio Note
In addition to serving as Little Rock's traffic judge, Vic Fleming is on faculty of the National Judicial College's "Courage to Live" program, which trains judges to implement alcohol-awareness programs in middle schools and high schools.

Have you seen me?

The Arkansas Attorney General's Office houses the Arkansas Missing Children Services Program (AMCSP), which serves as the main point of contact between Arkansas and the National Center for Missing and Exploited Children.

AMCSP is designed to assist law-enforcement agencies with their investigations, provide training to investigatory agencies, distribute safety materials to the public, and assist families with a missing child.

AMCSP has a toll-free number (1-800-448-3014) for reports or sightings of missing children. A state-of-the-art computer messaging system allows data to be disseminated within minutes to other states or national agencies, including photographs of children. AMCSP can help law-enforcement agencies create posters of missing children and can post photos on its Web site and the Web site of the National Center for Missing and Exploited Children.

If you have information about any of the children displayed in photographs in this newsletter, or if you would like more information about the AMCSP, call

1-800-448-3014 or 501-682-3645.

Jessica Lombana

Missing: September 10, 2003
Missing from: Conway, AR
Birthdate: June 18, 1987
Hair: Brown • Eyes: Brown • Height: 5'5"

Patricia Stevens

Missing: August 23, 2003
Missing from: Morrilton, AR
Birthdate: October 26, 1987
Hair: Brown • Eyes: Brown • Height: 5'7"

Braden England

Missing: November 4, 2001
Missing from: Fort Smith, AR
Birthdate: December 17, 1994
Hair: Blonde • Eyes: Hazel • Height: 3'8"

Abigail England

Missing: November 4, 2001
Missing from: Fort Smith, AR
Birthdate: May 24, 1997
Hair: Blonde • Eyes: Blue • Height: 3'4"

ARKANSAS MISSING CHILDREN SERVICES PROGRAM

Arkansas Attorney General
Mike Beebe

323 Center Street, Suite 1100
Little Rock, AR 72201
1-800-448-3014
(501) 682-1020
www.ag.state.ar.us

First-Class Mail
Auto
U.S. Postage Paid
AR ATTY GEN OFF
Permit No. 1106